



Signed: March 07, 2007

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
RICHARD CONRAD LAM,
Debtor.

No. 05-44314 TT
Chapter 7

CAROL A. LAM,
Plaintiff,
vs.

A.P. No. 05-4455 AT

RICHARD CONRAD LAM,
Defendant.

BARRY L. SIDERS

A.P. No. 05-04447 AT

vs.

(Consolidated for Trial)

RICHARD CONRAD LAM,
Defendant.

MEMORANDUM OF DECISION AFTER TRIAL

In one of the two above-captioned adversary proceedings, Carol Lam ("Carol"), the former spouse of the debtor Richard Conrad Lam ("Richard"), seeks to except a debt in the amount of \$208,500 based

1 on a state court judgment in the couple's dissolution proceeding
2 (the "Conversion Debt") from Richard's chapter 7 bankruptcy
3 discharge pursuant to either 11 U.S.C. § 523(a)(4) or § 523(a)(15).
4 In the second adversary proceeding, Carol's dissolution attorney
5 ("Siders") seeks to except from Richard's discharge pursuant to 11
6 U.S.C. § 523(a)(15) a \$29,000 debt for attorneys' fee that Richard
7 was ordered to pay to Siders as a sanction in the dissolution
8 proceeding (the "Attorneys' Fee Debt"). For the reasons stated
9 below, the Court concludes that the Conversion Debt is
10 nondischargeable under 11 U.S.C. § 523(a)(4) and that the
11 Attorneys' Fee Debt is nondischargeable under 11 U.S.C. §
12 523(a)(15).
13

14 **SUMMARY OF FACTS**

15 In 1999, a marital dissolution proceeding was commenced in
16 state court to dissolve Carol's and Richard's marriage. Various
17 evidentiary hearings were conducted during the proceeding. In one
18 of these hearings, the issue was whether Richard was liable to
19 reimburse Carol for \$417,000 of community property that he had used
20 to pay a pre-marital debt: i.e., child support for his children
21 from a prior marriage.
22

23 The state court judge, the Honorable James H. Libbey ("Judge
24 Libbey"), concluded that Richard was liable to reimburse Carol on
25 this account. In November 2004, he issued a decision (the "Libbey
26 Decision"), ordering Richard to reimburse Carol for either one-half

1 of the \$417,000, if he used his separate property to make the
2 reimbursement, or for the entire amount, if he used community
3 property. He based this decision on Cal. Fam. Code § 915 which
4 gives a spouse a right of reimbursement in a dissolution proceeding
5 when the other spouse has used community property to pay child or
6 spousal support from a prior marriage when he or she had separate
7 property income available.¹ He found that, during the marriage,
8 Richard had separate property available to pay the child support
9 from his prior marriage in the form of separate property retirement
10 and investment accounts.
11

12 On August 4, 2005, Richard filed a bankruptcy petition,
13 commencing the above-captioned chapter 7 case.² Thereafter, the
14 two above-captioned adversary proceedings were filed, seeking to
15 except the Conversion Debt and the Attorneys' Fee Debt from
16 Richard's discharge. The two proceedings were consolidated for
17 trial, were tried to the Court on February 12, 2007, and, at the
18

19 ¹ Cal. Fam. Code § 915 provides, in pertinent part, as
20 follows: "...a child or spousal support obligation of a married
21 person that does not arise out of the marriage shall be treated as
22 a debt incurred before marriage....(b) If property in the community
23 estate is applied to the satisfaction of a child or spousal support
24 obligation of a married person that does not arise out of the
marriage, at a time when nonexempt separate income of the person is
available but is not applied to the satisfaction of the obligation,
the community estate is entitled to reimbursement from the person
in the amount of the separate income,...." Cal. Fam. Code § 915
(2007).

25 ² As a result, Richard's case and these adversary proceedings
26 are not governed in any pertinent aspect by the changes to the
Bankruptcy Code made by the Bankruptcy Abuse Prevention and
Consumer Protections Act of 2005 ("BAPCPA").

1 conclusion of the trial, were taken under submission.

2 DISCUSSION

3 A. APPLICABLE LAW

4 The Bankruptcy Code is designed to afford individual debtors a
5 "fresh start." In re Bugna, 33 F.3d 1054, 1059 (9th Cir. 1994).
6 Dischargeability provisions are generally construed liberally in
7 favor of debtors. Id. However, 11 U.S.C. § 523(a) limits the
8 scope of the "fresh start" by denying the debtor a discharge for
9 certain types of debts. In re Bammer, 131 F.3d 788, 793 (9th Cir.
10 1997) (en banc). In Cohen v. de la Cruz, 523 U.S. 213 (1998), the
11 Supreme Court explained that "[t]he various exceptions to discharge
12 in 523(a) reflect a conclusion on the part of Congress 'that the
13 creditors' interest in recovering full payment of debts in these
14 categories outweigh[s] the debtors' interest in a complete fresh
15 start.'" Id. at 222 (quoting Grogan v. Garner, 498 U.S. 279, 287
16 (1991)).

17 Section 523(a)(4) excepts from an individual debtor's chapter
18 7 discharge a debt for defalcation while acting in a fiduciary
19 capacity. See 11 U.S.C. § 523(a)(4); Banks v. Gill Distribution
20 Centers, Inc., 263 F.3d 862, 870 (9th Cir. 2001). Defalcation has
21 been defined as the "misappropriation of trust funds or money held
22 in any fiduciary capacity; [the] failure to properly account for
23 such funds. Under § 523(a)(4), defalcation includes the innocent
24 default of a fiduciary who fails to account fully for money
25
26

1 received." In re Lewis, 97 F.3d 1182, 1186 (9th Cir. 1996) (quoted
2 in Banks at 870). Such a debt is nondischargeable under §
3 523(a)(4) only "where (1) an express trust existed, (2) the debt
4 was caused by fraud or defalcation, and (3) the debtor acted as a
5 fiduciary to the creditor at the time the debt was created." In re
6 Niles, 106 F.3d 1456, 1459 (9th Cir. 1997).

7
8 Section 523(a)(15) excepts from an individual debtor's chapter
9 7 discharge a nonsupport debt arising from a dissolution proceeding
10 under Section 523(a)(15) unless the debtor is either unable to pay
11 the debt or the debtor would suffer greater prejudice if the debt
12 were excepted from his discharge than the debtor's former spouse
13 would suffer if the debt were discharged. See 11 U.S.C. §
14 523(a)(15).³

15 Generally, the plaintiff in a nondischargeability action bears
16 the burden of proof on all elements of the claim by a preponderance
17 of the evidence. See Grogan v. Garner, 498 U.S. 279 (1991). Thus,
18 Carol has the burden to proof with respect to her claim to except
19 the Conversion Debt from Richard's discharge pursuant to 11 U.S.C.
20 § 523(a)(4). However, once the party seeking to except a debt
21 under 11 U.S.C. § 523(a)(15) meets her burden of proving that the
22 debt is a nonsupport debt arising from a dissolution proceeding,
23 the burden shifts to the debtor to prove that he is unable to pay
24

25
26 ³ BAPCPA amended 11 U.S.C. § 523(a)(15) so that all
dissolution related debts are now nondischargeable. See 11 U.S.C.
§ 523(a)(15)(2005). However, as noted above, this proceeding is
not subject to BAPCPA.

1 the debt. In re Jodoin, 209 B.R. 132 (Bankr. 9th Cir. 1997); In re
2 Morris, 193 B.R. 949, 952 (Bankr. S.D. Cal. 1996).

3
4 **B. DISCHARGEABILITY OF CONVERSION DEBT UNDER 11 U.S.C. §**
5 **523(a)(4)**

6 As set forth above, 11 U.S.C. § 523(a)(4) renders
7 nondischargeable a debt for defalcation by a fiduciary. The
8 question of whether the debtor was a fiduciary with respect to the
9 claimant is governed by federal law. In re Cantrell, 329 F.3d
10 1119, 1125 (9th Cir. 2003); In re Gergely, 110 F.3d 1448, 1450 (9th
11 Cir. 1997). Under federal law, the fiduciary relationship must
12 arise from an express trust imposed before and without reference to
13 the wrongdoing that created the debt. Cantrell, 329 F.3d at 1125;
14 In re Lewis, 97 F.3d 1182, 1185 (9th Cir. 1996). However, state
15 law is consulted to determine whether the requisite trust
16 relationship exists. Cantrell, 329 F.3d at 1125; Lewis, 97 F.3d at
17 1185.

18 Under the California law, spouses act as fiduciaries *inter se*
19 with respect to the management and control of the community assets.
20 Cal. Family Code §§ 1100(e), 1101(a) (2007). These provisions make
21 spouses fiduciaries with respect to community property in the
22 narrow sense required by 11 U.S.C. § 523(a)(4). Thus, a
23 defalcation by a debtor with respect to his use of the community
24 property will give rise to a nondischargeable debt under 11 U.S.C.
25 § 523(a)(4).
26

As noted above, based on the evidence presented to him at

1 trial in the dissolution proceeding, Judge Libbey found that
2 Richard used \$417,000 of community property to pay child support
3 from a prior marriage at a time when he had separate property in
4 the form of retirement and investment accounts available to make
5 the payments. Based on this finding, Judge Libbey ordered Richard
6 to reimburse Carol for this use of their community property. He
7 based this order on the conclusion that Richard had breached Cal.
8 Fam. Code § 915(b) which requires a spouse to make such payments
9 first from separate property income if possible.
10

11 Richard contends that, although this order created a debt to
12 Carol, it did not constitute a debt arising from a breach of his
13 fiduciary duty. He notes that Cal. Fam. Code § 915(b) requires
14 only that separate property income be used first to make child
15 support payments from a prior marriage, not separate property. He
16 notes that the only evidence presented was that he had separate
17 property, not separate property income, at the time he made the
18 payments.
19

20 This argument might be persuasive if one was limited to an
21 examination of the plain language of the statute. However, the
22 comments to Cal. Fam. Code § 915 indicate that the the California
23 Legislature used the terms "income" and "property" interchangeably.
24 See Cal. Fam. Code § 915 cmt. (2007) ("the general rule is that the
25 separate property of the obligor spouse and the community estate of
26 the marriage is liable for the support obligation [of the prior

1 marriage], other than the earnings of the non-obligor spouse").
2 Based on the foregoing, the Court concludes that Richard's use of
3 the community property to pay child support from his prior marriage
4 constituted a breach of fiduciary duty under 11 U.S.C. § 523(a)(4).
5 Thus, the Conversion Debt is nondischargeable.
6

7 **C. DISCHARGEABILITY OF ATTORNEYS' FEE DEBT UNDER 11 U.S.C. §**
8 **523(a)(15)**

9 Siders seeks to except the \$29,000 Attorneys' Fee Debt pursuant
10 to 11 U.S.C. § 523(a)(15).⁴ As noted above, Siders has the initial
11 burden of establishing that the debt sought to be excepted from the
12 debtor's discharge under 11 U.S.C. § 523(a)(15) is a nonsupport
13 debt arising in connection with a dissolution proceeding. This
14 burden was easily satisfied. The burden then shifted to Richard to
15 establish either that he is unable to pay the Attorneys' Fee Debt
16 or that he would be more greatly prejudiced if the Attorneys' Fee
17 Debt were excepted from his discharge than Carol would be if it
18 were discharged. Richard presented no evidence concerning Carol's
19 financial condition nor did Carol. As a result, the Court has no
20 basis for balancing the equities. Thus, Richard was required to
21 prove, by a preponderance of the evidence, that he was unable to
22 pay the Attorneys' Fee Debt. See 11 U.S.C. § 523(a)(15)(A).
23

24 ⁴Carol asserted 11 U.S.C. § 523(a)(15) as an independent
25 ground for excepting the Conversion Debt from Richard's discharge.
26 Since the Court concludes that the Conversion Debt is
nondischargeable under 11 U.S.C. § 523(a)(4), it need not consider
this alternative ground. However, the Court is mindful that, based
on its ruling, the Conversion Debt will survive Richard's discharge
and thus affect his ability to pay the Attorneys' Fee Debt.

1 The evidence presented established that Richard is 63 years
2 old, in relatively good health, and is an experienced tax attorney
3 with a history of earning in excess of \$200,000 a year.⁵ From 1998
4 to 2001, he was employed as an area director in the International
5 Tax Group with Ernst & Young LLP in Houston, Texas. Before that,
6 he was employed by Pricewaterhouse Coopers, Chevron Corporation,
7 and the Gulf Oil Corporation. According to Richard, in 2001, he
8 was terminated by Ernst & Young. He moved back to California and
9 attempted to obtain employment in the field of his tax specialty.
10 When he was unsuccessful, he took the California Bar Examination,
11 and began practicing law as a sole practitioner, primarily in the
12 area of family law, with which he had no prior experience.
13

14 Richard testified that his net income during 2005 was \$23,317
15 and during 2006 \$16,925. He testified that his income during 2006
16 is more indicative of his ability to pay his debts since in 2005 he
17 earned a one-time consulting fee of \$18,000. His personal expenses
18 are approximately \$21,000 per year. In addition to his personal
19 expenses, for the next three years, he is obligated to pay \$1,171
20 per month in child support and \$964 per month in alimony. He also
21 has nondischargeable debt for child support arrearages of \$167,288,
22 tax debt of \$38,718, and, now the \$208,500 Conversion Debt,
23 for a total of \$414,506. He contends that this is sufficient to
24

25 ⁵Richard testified that he had some health problems. However,
26 the Court was not convinced that these problems were sufficiently
serious to interfere with his ability to work for the next ten
years or so.

1 meet his burden of proving by a preponderance of the evidence that
2 he is unable to pay the Attorneys' Fee Claim.

3 The Court is not persuaded. The Court accepts as a
4 possibility that Richard's financial circumstances will not improve
5 during the remainder of his working life or at least not
6 sufficiently to pay his other nondischargeable debt and the
7 Attorneys' Fee Debt. However, the Court finds that it is equally
8 possible that Richard will continue to practice law for another ten
9 years and that his income will increase substantially. This could
10 occur in various ways. He could find employment at a creditable
11 law firm. The Court is unable to believe that an experienced tax
12 attorney, employed by a creditable firm, would be paid less than
13 \$150,000 a year. With a salary of this amount, given a continued
14 working life of another ten years, Richard could easily pay all his
15 nondischargeable debt, including the Attorneys' Fee Debt.
16 Alternatively, Richard could decide to continue to practice on his
17 own, perhaps even in the family law area. Again, it is not
18 unreasonable to expect a family law attorney to earn \$150,000
19 annually.
20
21

22 Since the Court finds that either scenario is equally
23 possible, it is forced to conclude that Richard has failed to meet
24 his burden of proving an inability to pay the Attorneys' Fee Claim.
25 Moreover, 11 U.S.C. § 523(a)(15) requires the Court to consider the
26 debtor's property as well as his income in determining his ability

1 to pay a nonsupport debt arising from a dissolution proceeding. It
2 was undisputed that Richard has approximately \$186,900 in an
3 Individual Retirement Account. Although this amount would be
4 subject to taxation when withdrawn, even if it were reduced in this
5 fashion, it would still provide a substantial additional amount
6 with which Richard could either pay his personal expenses or his
7 nondischargeable debt. Based on these findings, the Court
8 concludes that the Attorneys' Fee Debt is nondischargeable under 11
9 U.S.C. § 523(a)(15).
10

11 CONCLUSION

12 The Court concludes that the Conversion Debt is
13 nondischargeable under 11 U.S.C. § 523(a)(4). Carol's right to
14 reimbursement pursuant to Cal. Fam. Code § 915(b) for half the
15 community property used by Richard to pay child support from his
16 prior marriage qualifies as a debt for defalcation by a fiduciary
17 within the meaning of 11 U.S.C. § 523(a)(4). The Court concludes
18 that the Attorneys' Fee Claim is nondischargeable under 11 U.S.C. §
19 523(a)(15). While Richard has limited income at present and
20 substantial other nondischargeable debt, including now the
21 Conversion Debt, Richard failed to persuade the Court that, more
22 likely than not, his future income would not be sufficient to
23 enable him to pay the Attorneys' Fee Debt. Counsel for Carol is
24 directed to submit a proposed form of judgment in accordance with
25 this decision.
26

END OF DOCUMENT

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